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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
	)	
Rules and Policies on Foreign Participation in the U.S. Telecommunications Market	)	IB Docket No. 97-142
	)	

COMMENTS OF SPRINT

Sprint Communications Company, L.P. ("Sprint") respectfully submits its comments in the above-captioned proceeding.[1]

SUMMARY

Sprint strongly supports the Commission's proposal to eliminate the ECO test for many purposes. However, the Commission's NPRM is in many ways a curious amalgam of too much and too little. The proposal to eliminate the ECO test only for applicants from WTO Member Countries but to retain it for applicants from non-members, for example, would presumptively grant the application of a carrier from a WTO Member Country that made poor or no commitments. Yet entry might well be denied to an applicant from a non-member country who posed little or no danger to U.S. competition.

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[1] *See* Order and Notice of Proposed Rulemaking, IB Docket No. 97-142, released June 4, 1997 ("NPRM").

On the other hand, the Commission's proposal to eliminate the ECO test for purposes of accounting rate flexibility and to replace it with a presumption in favor of flexibility for carriers from WTO Member countries goes too far: it could make it much easier for a dominant carrier from a WTO Member Country to discriminate against U.S. carriers when neither competition nor regulation inhibits the exercise of market power. WTO membership, standing alone, would not prevent such damage to U.S. competition. A substitute threshold test for accounting rate flexibility remains necessary for dominant carriers from WTO Member Countries. Sprint suggests that the Commission use a 65% market share by the dominant carrier as a proxy for workable competition in a foreign country.

A final source of concern is that the NPRM gives the impression that the Commission is seeking to retain the ability to deny entry to applicants from WTO Member Countries or to otherwise disadvantage such applicants on the basis of their foreign origin. Sprint urges the Commission to make sure that its final order in this proceeding does not create such a false impression.

Rather than focusing on the foreign identity of an applicant or investor and on the Commission's desire to promote the virtues of telecommunications competition to other countries who may not share the its views, Sprint urges the Commission to focus more sharply on dangers to competition posed by individual applications. The Commission should then craft appropriate tools to deal with these dangers, while keeping in mind that unnecessary regulation is just as capable of inhibiting competition as is lack of regulation where needed.

I. *The Commission Should Eliminate the ECO Test Everywhere*

Sprint strongly supports the Commission's proposal to eliminate its effective competitive opportunities ("ECO") test for U.S. market entrants from WTO member countries. Sprint also urges the Commission to eliminate the ECO test in all other countries as well. For some time now, Sprint has been urging the Commission to eliminate the ECO test as unworkable and impractical.[2] In the NPRM the Commission acknowledged (para. 34) that the market power and ECO analyses undertaken since the ECO test was established required "substantial commitments of time and resources by both private parties and the Commission." Elsewhere in the NPRM, the Commission recognized that "analyzing the effectiveness of regulation in a foreign market imposes significant burdens on the Commission and on applicants and delays foreign carrier entry."[3]

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[2] *See, e.g.*, Opposition of Sprint in CC Docket No. 90-337, April 10, 1997 at 8.

[3] NPRM at para. 87.

Apart from any regulatory burden, however, the ECO test must be fully eliminated on all WTO Member Country routes because it is now inconsistent with the U.S. Government's obligations under the WTO Basic Telecom Agreement. With minor exceptions, the United States has agreed to open its telecommunications market to other WTO Member Countries. The Commission therefore cannot deny a 214 application because U.S. carriers do not have effective competitive opportunities in a particular applicant's "home" country or because the country's regulation does not comport with the FCC's view of what is appropriate.[4]

Nor does the U.S. Government's adoption of the Reference Paper as part of its WTO commitments permit continuation of the ECO test. The U.S. commits to certain competitive safeguards. But these safeguards do not, for example, permit the U.S. Government and the Commission to deny a foreign carrier from a WTO Member Country entry into the U.S. market. Nor could such entry be denied because the Commission believed that a foreign regulator was not sufficiently independent. The Reference Paper's regulatory principles were established to facilitate entry and

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[4] The first element of the ECO test requires the Commission to determine whether U.S. carriers are permitted, as a matter of law, to offer international facilities-based services in the destination foreign country. The fourth element of the ECO test is whether there is an effective regulatory framework in a destination country. *See* Market Entry and Regulation of Foreign-Affiliated Entities, 11 FCC Rcd 3873 (1995) at paras. 47, 54.

effective competition through appropriate procedures and safeguards.

While Sprint believes that the Commission must eliminate the ECO test with respect to WTO Member Countries, it also urges the Commission as a policy matter to eliminate the ECO test for foreign carriers who are not from WTO Member Countries as well. As a practical matter, the ECO test is not any easier to administer because the country in question is not a member of the WTO. On the contrary, a detailed regulatory and competitive analysis of the smaller, more remote, or less developed countries that typically have remained outside the WTO is likely to be even more frustrating (because of lack of information) and less productive (because non-WTO countries are extremely unlikely to throw open their market in exchange for entry into the U.S. market) than the situations the Commission has thus far encountered.

The Commission also cannot assume that the pro-competitive commitments in the February 15, 1997 WTO Basic Telecom Agreement ("WTO Agreement") safely permit the Commission to discard the ECO test only for WTO Member Countries. As the Commission itself recognizes, there are WTO members who made no commitments or who made minimal commitments under the WTO Agreement. Ironically, under the Commission's proposal, applicants from WTO Member Countries who made poor or no market opening commitments would presumptively (and, as Sprint discusses below, perhaps absolutely) be entitled to a grant of their applications. But applicants from countries who were not members of the WTO might fail the ECO test and have their applications denied. This would be so even if telecommunications markets in the latter countries were more competitive than the markets of WTO Member Countries who made poor or no commitments.

Sprint continues to believe that the Commission's focus is properly upon telecommunications competition in the United States. The Commission states, at least with respect to new entrants from WTO member countries, that "the characteristics that can be expected to raise concerns of anticompetitive conduct will not be the carrier's foreign affiliation but factors that could result in competitive distortions."[5] This should be Commission's touchstone for new entrants from non-WTO member countries as well.

Along with the ECO test itself, the Commission should jettison its assumed obligation to encourage foreign governments to open their communications markets.[6] The openness of those foreign markets should be deemed relevant only insofar as it affects competition in the U.S. domestic

[5] NPRM at paras. 6, 27.

[6] NPRM at para. 16.

or international telecommunications markets. In the post-WTO environment, Sprint believes that this shift in focus is required for WTO Member Countries as a matter of law. And, as Sprint has argued before, it should be undertaken as well for all countries as a matter of policy. As with any other application, if a carrier from a country which is not a WTO member seeks to enter the U.S. market, the application should be entitled to consideration on its own merits and without any requirement that the country satisfy the ECO test before the application may be granted.

II. *The Commission Has Correctly Determined that it Should Routinely Grant 214 Authority to Foreign Carriers from WTO Member Countries Enabling These Carriers to Provide U.S. International Service*

Sprint supports the Commission's determination that a grant of 214 authority to a carrier from a WTO Member Country allowing it to provide international facilities-based, resold switched, or resold non-interconnected private line services would presumptively serve the public interest. Sprint does not object to the Commission's further determination that such a finding should be subject to a "rebuttable presumption" allowing a party to bring forth evidence to show, in opposition to a particular application, that this would not be the case and that the public interest would not be served. Such a presumption, however, may not go far enough in fulfilling U.S. obligations under the WTO Agreement.

Admittedly, it is difficult for the Commission or any party to assess at this time the competitive concerns that might be raised by all possible applications. Nevertheless, it would seem clear as a matter of law that denying an application from a carrier from a WTO Member Country must be limited to those applications that truly raise extraordinary competitive concerns. At this point, Sprint cannot think of such an example, meaning that the rebuttable presumption could be irrebuttable in fact.

The WTO requirements of National Treatment and Most Favored Nation (MFN) treatment also make it difficult to refuse to grant a 214 application by an applicant from a WTO Member Country. Even before the WTO Agreement, the Commission frequently granted international 214 applications from U.S. applicants that possessed substantial market power in other markets and the ability to distort competition.[7]

In order to prevent damage to competition, the Commission oftentimes depended upon regulatory safeguards such as reporting requirements, dominant carrier classification, and proscription of certain types of behavior. In some cases, the Commission has imposed relatively few safeguards, classifying the applicant as nondominant even though it has market power in other

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[7] *See, e.g.*, Service off the Island of Puerto Rico, 2 FCC Rcd 6600 (1987); recon. 71 RR 2d 1090 (1992).

markets.[8] It has been extremely rare for the Commission to deny a 214 application because of potential harm to competition.[9]

Given this history, if the Commission ever denied 214 authority to an applicant from a WTO Member Country on the grounds that the application posed a very high risk to competition, the consistency of the Commission's action with the National Treatment obligation might well be the subject of intergovernmental consultation and resolution before a WTO Dispute Resolution panel. Similarly, MFN issues will likely be raised if the Commission refuses to grant 214 authority to an applicant from a WTO Member Country when the Commission has, to Sprint's knowledge, never denied a 214 application of carriers from the U.K. or Canada, for example.

Also problematic is the Commission's suggestion that generalized public interest factors such as "national security, law enforcement, foreign policy, or trade concerns" might require denial of an application. NPRM at

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[8] *See* GTE Hawaiian Telephone Company, Inc. DA 96-1748, released October 22, 1996.

[9] In the past, the Commission has gone so far as to grant 214 applications even assuming that there would be a loss of potential competition, that the applicant's entry would raise further barriers to entry, and that the applicant had the potential to commit illegal acts in restraint of trade. Satellite Business Systems, 62 FCC 2d 997 at 1098 (1977), *aff'd sub nom.* U.S. v. FCC, 652 F.2d 72 (D.C. Cir. 1980). The Commission has, however, denied 214 applications for failure to comply with the ECO test. *See, e.g.*, Telefonica Larga Distancia de Puerto Rico, Inc., FCC 97-127, released May 2, 1997.

para. 47. In particular, the U.S. Government's retention of the ability to prevent entry of an applicant from a WTO Member Country on trade grounds after signing the WTO Agreement strikes Sprint as incongruous. The use of national security, law enforcement, or foreign policy grounds as a basis for denying applications also leaves the Commission open to the charges that applications are being denied on the basis of national origin without explicitly saying so. At the very least, making entry for WTO Member Countries dependent on generalized public interest factors would raise legitimate doubts that the Commission's rules provide the "reasonable, objective and impartial"[10] framework for foreign competition required by the General Agreement on Trade and Services.

The Commission asks (at para. 47) if the ECO test should be retained for WTO Member Countries that have made poor or no commitments. As indicated above, Sprint believes that the ECO test is inconsistent with the U.S. Government's obligations under the WTO Agreement. It would therefore be inappropriate to deny the 214 application of a carrier from a WTO Member Country regardless of the quality of that country's offer. As such, Sprint anticipates that the conditions that the Commission may impose on an applicant from a WTO Member Country which has made poor or no commitments will take on additional importance, but the application cannot be denied or unreasonably conditioned because of the perceived poor "quality" of the commitment made by the WTO Member Country.

Sprint instead invites the Commission to consider the conditions it should impose on any 214 application that presents a danger to U.S. competition. This focus should also extend (and in the same way) to carriers that are not from WTO Member Countries. The threat to competition from carriers from non-WTO Member Countries (or even from some U.S. carriers)[11] is roughly the same as for carriers from WTO Member Countries that have made "poor or no commitments."

Rather than the ill-fated ECO test, Sprint believes that for both WTO Member Countries and non-member countries the Commission should place primary reliance on enforcing its rules against discrimination and on its proposed benchmark accounting rates.[12] As discussed below, although

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[10] NPRM at para. 6.

[11] *See, e.g.,* Atlantic Tele-Network v. FCC, 59 F.3d 1384 (D.C. Cir. 1995) (Commission conditioned grant of 214 application to U.S. carrier owning 80 percent interest in monopoly foreign carrier in Guyana on adherence to requirement of proportionate return); GTE Telecom Incorporated, ITC-95-443, DA 96-1546 (Int'l Bureau), released September 16, 1996 (Commission deferred decision on whether to grant GTE Telecom authority to resell switched services to the Dominican Republic and to Venezuela because of its affiliation with Compania Dominicana de Telefonos, C. Por A. in the Dominican Republic and with Compania Anonima Nacional Telefonos de Venezuela in Venezuela).

[12] International Settlement Rates, IB Docket No. 96-261, Notice of Proposed Rulemaking, FCC 96-484, released December 19, 1996 ("Benchmarks").

Sprint believes that that the conditions on entry (both basic and supplemental) proposed by the Commission are helpful in protecting U.S. competition, the primary defenses against foreign discrimination and inbound bypass must include vigorous enforcement of the rules against discrimination and a reduction of accounting rates to reflect the underlying costs of terminating U.S. traffic.

III. *Switched Services Provided Over Facilities-Based and Resold Private Lines*

Like the treatment of facilities-based, resold switched, or resold non-interconnected private line applications, 214 applications for the provision of switched services provided over facilities-based and resold private lines between the U.S. and WTO Member Countries must also be considered outside of any ECO test. The WTO Agreement and its principles of MFN and National Treatment require this. While the Commission may impose reasonable safeguards, it cannot deny the 214 application of a carrier from a WTO Member Country on grounds of foreign ownership.

The Commission believes that within the WTO Member Countries, at least, additional foreign competition will place "considerable pressure for reform"[13] on the accounting rate system. More importantly, in its *Benchmarks* proceeding, it has proposed to require adherence to

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[13] NPRM at para. 50.

prescribed accounting rate benchmarks as a condition of the use of resold or self-provided private lines to provide switched international services.

The commitments to competition by most of the WTO Member Countries should in the long run force accounting rates much closer to costs. Such competition in foreign countries will take time to develop, however. The ability to bypass the accounting rate system for U.S. outbound traffic is, therefore, unlikely to develop as quickly as the ability of a foreign carrier from a WTO Member Country to bypass accounting rates for U.S. inbound traffic. As stated, Sprint believes that the establishment of proper accounting rate benchmarks is a critical ingredient in the Commission's proposal to permit the unlimited bypass of the accounting rate system through the provision of switched services via resold or self-provided private lines.[14]

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[14] Sprint notes that the ability of more cost based accounting rates to diminish the incentive to bypass the accounting rates system for U.S. terminating traffic applies not only to WTO Member Countries, but to all countries that utilize the accounting rate system. Cost-oriented accounting rates are therefore one key to permitting the unlimited provision of switched service over resold or self-provisioned private lines whether the country in question is a WTO member or not. Sprint therefore disagrees with the Commission's proposal at para. 55 of the NPRM that the ECO test be used to decide whether to allow the provision of switched services over resold or self-provided private lines between the U.S. and a non-WTO Member Country. After all, competition is only a means to an end: if the Commission's benchmarks achieve accounting rates that would exist in a competitive market, and there is no discrimination by a dominant or monopoly foreign carrier against U.S. carriers, there is little reason to care whether service is provided in a monopoly or a competitive environment in a particular foreign country.

The primary reason why these offerings are attractive is because they permit the provider to arbitrage between the relatively lower prices for piece parts which may be combined to provide switched international services and equivalent switched services which are provided under the accounting rate system.[15] By requiring the use by U.S. carriers of accounting and settlement rates closely related to costs, the Commission will eliminate, or at least substantially reduce, the price differential which currently makes arbitrage so attractive. This in turn will lessen the artificial demand for the switched services provided via resold or self-provisioned private lines that are interconnected to the public switched network.[16]

IV. *Submarine Cables and Foreign Investment in Radio Licenses*

The Commission proposes to treat applications for submarine cable landing licenses in a manner similar to 214 applications for facilities based, resold switched, and resold non-interconnected private lines -*i.e.*, that applicants for cable landing licenses from WTO Member Countries would be routinely granted. The Commission,

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[15] In para. 34 of its Benchmarks proceeding, the Commission said that settlement rates "appear in most instances to be well in excess of any estimate of reasonable termination costs."

[16] Obviously, the benchmark levels, together with existing collection rates, will play a critical role in how much arbitrage is likely to occur in a post-benchmark world. The greater the spread between existing collection rates and the benchmarks the Commission establishes, the greater the incentive for arbitrage.

however, suggests that it might deny such a license in cases where grant of the license would pose "a high risk to competition," NPRM at para. 63. For applicants from countries who do not belong to the WTO, the Commission would retain its ECO test.

Here again, Sprint believes that there will be cases where there is no difference in the danger to competition posed on the one hand by a cable license applicant from a WTO Member Country who made no commitments or poor commitments and on the other hand by an applicant from a country that was not a member of the WTO. In the former case, the Commission suggests that it might deny the application when there is a high risk to competition. In the latter, the Commission presumably would deny the application for failure to meet the ECO test.[17]

Consistency and sound policy dictate that the two applications be treated similarly. Under MFN, there is no basis for denying a cable license to a carrier from a WTO Member Country while granting such licenses to applicants from other WTO Member Countries.[18] If there are concerns about potential risks to competition, the grant should be

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[17] *See* Telefonica Larga Distancia de Puerto Rico, Inc., *supra* at n. 9.

[18] *See, e.g.,* Matter of GST International, Inc., File No. SCL-96-006, released April 30, 1997; Cable and Wireless, PLC, File No. SCL-96-005, FCC 97-204, released June 20, 1997.

made subject to conditions to guard against anticompetitive conduct.

As for radio license applications that are subject to the limitations of Section 310(b)(4) of the Communications Act,[19] Sprint supports the Commission's proposal to eliminate the ECO test for pending as well as future applications as part of the Commission's public interest analysis under that subsection. However, Sprint urges the Commission to go further and to eliminate the ECO test when such applications are filed by applicants whose home market is not a WTO member.

Here again, the Commission proposes to establish a strong presumption that an application for a common carrier radio license should be granted if an applicant's foreign investor has its home market[20] in a WTO Member Country. Although the Commission again proposes to reserve the right to deny an application that posed a very high risk to competition or on the basis of generalized public interest factors, denial of an application on such grounds might well be inconsistent with the U.S. Government's commitments under the WTO Agreement. As is true for 214 applicants, Sprint

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[19] Briefly, this subsection permits the Commission to deny an application for a common carrier, broadcast, or aeronautical radio license if more than 25 percent of the applicant is indirectly foreign owned and denial of the application would serve the public interest.

[20] Sprint concurs that to date, at least, the Commission's "home market" test has proved workable. It remains to be seen whether it will continue to be workable in the future when different kinds of alliances, ventures, and partnerships apply for common carrier radio licenses.

believes it will be rare (and perhaps impossible altogether) for the Commission to deny a common carrier radio application by an applicant whose home country is a WTO member.

Sprint believes that applications or investments which pose similar degrees of harm to competition should be conditioned similarly, whether from U.S. or foreign firms. It should not matter whether the investor's home country meets the ECO test.

Sprint finds it particularly unlikely that noncontrolling investments in Section 310(b) licensees (as well as in U.S. carriers generally) would ever pose a threat to U.S. competition. Telecommunications is a capital intensive business, and the U.S. derives significant benefits from foreign investment irrespective of the state of competition in the investor's home country. If an applicant from a country, whether or not a WTO member, which has chosen not to participate in the benefits of a competitive telecommunications market wishes to invest scarce capital in the U.S. telecommunications business, that investment should be encouraged. It should not (and, in the case of WTO Member Countries, cannot) be turned away because the applicant is foreign and the Commission disagrees with that country's telecommunications policies. If telecommunications competition is in the public interest, not only in the United States but everywhere, this will become self evident and most countries will ultimately follow similar policies.

For this reason, and in response to para. 75 of the NPRM, Sprint believes that the Commission should make clear that it will not review increases in foreign ownership by a licensee that already has more than 25 percent foreign ownership[21] so long as no transfer of control is effected thereby.[22] In fact, Sprint does not see any valid reason for the Commission to review differently foreign or domestic investment in a U.S. carrier which does not result in a change of control. It is difficult to envision a set of circumstances where the nationality of the investors will be determinative of the public interest.

V. *Regulatory Issues*

Sprint believes that there will be few, if any, cases where the Commission will deny the 214 application or the

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[21] Although the Commission asked this question in the context of foreign ownership of radio licensees, the same standard should apply with respect to foreign investments in U.S. carriers that do not hold radio licenses. For example, and as discussed further below, the Commission should not, and under the WTO Agreement it may not, enforce the condition in the Sprint Order requiring prior Commission approval before France Telecom and Deutsche Telekom may increase their investment in Sprint so long as no change of control is effected thereby.

[22] Nor could the Commission deny on the basis of the foreign identity of the proposed transferee's parent an application under Section 310(d) of the Act to transfer control of a radio licensee or an applicant for such a license to an entity which is from a WTO Member Country. Under the WTO Agreement, the United States Government agreed to 100% indirect ownership of U.S. radio licensees.

common carrier radio license application of a carrier from a WTO Member Country. Thus, Sprint expects that the Commission is most likely to face issues over whether and what conditions to apply to applications filed by a foreign carrier with market power or by a U.S. affiliate of such a carrier.

Sprint concurs that it is necessary and appropriate for the Commission to impose conditions on applicants who pose dangers to U.S. competition, such as carriers, including U.S. carriers,[23] who would leverage their market power in one or more foreign countries into the U.S. market. The Commission should, however, more closely tailor its conditions to the dangers presented by a particular application. Excessive or unnecessary conditions will harm competition just as surely as not imposing conditions when they are needed.

For example, Sprint believes the Commission's affiliation test is insufficiently attuned to the realities of the marketplace. The Commission believes that a 25% ownership of a U.S. carrier by a foreign carrier with market power is sufficient to require dominant carrier treatment of that U.S. carrier. In Sprint's own case, a 10% equity interest in Sprint's parent corporation by each of FT and DT was deemed sufficient by the Commission to require dominant

[23] *See* Atlantic Tele-Network v. FCC, n. 12, *supra.*

carrier treatment of Sprint on its U.S.-France and U.S.-Germany routes for fear that FT and DT would discriminate in favor of Sprint and against other U.S. carriers.[24]

As investment increases, not only does the incentive to discriminate increase, but also the means to accomplish such discrimination. The ability of members of a commonly owned enterprise to act in concert is entirely different than where minority interests, or even majority interests, are involved.

Assuming the affiliation standard is correctly set, Sprint supports the Commission's proposals to impose modified dominant carrier regulation on U.S. carriers who are affiliated with foreign carriers with market power. Sprint also supports the imposition of supplemental dominant carrier safeguards on U.S. carriers whose foreign affiliates do not face international facilities-based competition in some significant way.[25]

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[24] Sprint concurs with the Commission over the continued need to be vigilant about non-equity relationships between U.S. and foreign carriers as well. Sprint therefore supports the Commission's proposal in para. 86 to impose dominant carrier regulation, including the supplemental safeguards, on a U.S. carrier where a co-marketing or other arrangement with a foreign carrier that has market power presents a substantial risk to U.S. competition.

[25] Sprint believes that such treatment can be squared with the U.S. Government's MFN commitment: U.S. carriers affiliated with any foreign carrier who lacked market power would not be subject to the dominant carrier regulation, just as affiliation with a foreign carrier who had market power would result in the U.S. affiliate being regulated as dominant. Dominant carrier classification would not depend on national identity but on market power. National Treatment presents a more difficult issue, as the United States treats U.S. carriers with market power in disparate ways when they have sought authority to provide international communications service. These range from granting

The Commission, however, should be conscious of practical limitations on its ability to decide whether particular foreign carriers have market power or are international monopolists. Such attempts can easily degenerate into a reincarnated ECO test, with the Commission attempting to evaluate the competitive characteristics of unfamiliar foreign markets and reimposing all the burdens and disadvantages it now seeks to avoid.

Sprint suggests that in order to avoid supplemental dominant carrier safeguards, it should be sufficient if the U.S. affiliate of a foreign carrier demonstrates a) that facilities based international competition has been legally enabled; b) that licenses, to the extent they are required, have been issued; and c) that some international competition is taking place. This test is quite similar to the one the Commission proposes in para. 104 of the NPRM, with two changes: first, Sprint's test would require actual existence of competition in the foreign market; second, Sprint's test would be dispositive rather than presumptive.[26]

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nondominant treatment to carriers with market power (*e.g.* GTE Hawaiian Telephone Company, n. 8, *supra*,) to statutes denying them authority to provide international service originating from within their franchised service areas until they fulfill certain obligations mandated by Section 271 of the Telecommunications Act of 1996.

[26] Sprint believes that the existence of actual competition avoids the need for a presumption. As discussed below, the existence of a presumption will lead to exactly the type of litigation the Commission now seeks to avoid by eliminating the ECO test.

The Commission should not seek to determine the extent of such competition, whether it is likely to grow rapidly, or whether the incumbent carrier still possesses significant market advantages. Such determinations are almost certain to require an extensive evaluation of the workings of foreign markets that would not only burden the Commission's resources, but inevitably lead back to an evaluation of the effectiveness of foreign market regulation, which the Commission now correctly proposes to eschew.[27]

Some of the Commission's proposed supplemental dominant carrier safeguards, however, raise difficult issues that should be addressed on a case-by-case basis rather than through broad rules. For example, the Commission proposes at para. 105 to forbid a U.S. carrier that is subject to supplemental dominant carrier regulation from engaging in joint marketing of basic telecommunications services with the affiliated foreign carrier.

If the foreign carrier applies in its own name for a 214 license, however, there can be no "joint" marketing, for there is only one enterprise. And even if the foreign carrier creates a separate affiliate for U.S. licensing purposes, so long as the foreign carrier cannot discriminate

[27] *Cf.* NPRM at para. 87: ("[W]e propose that, in determining whether to classify a foreign-affiliated U.S. carrier as dominant with respect to an affiliated destination market, we should generally not consider the effectiveness of foreign regulation in the destination market as a relevant factor.")

in favor of its affiliate, Sprint is prepared to market head to head against a joint marketing effort conducted by a foreign carrier and its U.S. affiliate.

Sprint supports the proposal to prohibit "steering" of foreign market customers by the foreign carrier to its U.S. operations, although such a rule may be difficult to enforce. Presumably the Commission intended to refer to international communications (*e.g.* private line services) that are not subject to the Commission's proportionate return requirement; any attempts by a foreign carrier to "steer" a disproportionate amount of U.S.-terminating message traffic to its U.S. affiliate would clearly violate the rule requiring proportionate return.

Since the foreign carrier who would be subject to supplemental safeguards is by definition an international monopolist in its own country,[28] it will be the only carrier that a customer located in that foreign country can contact regarding international service to the U.S. This is an unearned competitive advantage that no other U.S. carrier has.[29]

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[28] If a country passes the simple three part test suggested above by Sprint and thus avoids the need for supplemental safeguards, there should be no restrictions on "steering."

[29] Sprint notes that the same unearned competitive advantage accrues to such foreign carriers who refer customers in their own country to U.S. carriers with whom the foreign carrier has a non-equity marketing or similar relationship.

If the "steering" takes place exclusively abroad, however, it will, as a practical matter, be difficult to prevent the foreign carrier from engaging in such conduct or to prevent the U.S. affiliate of that carrier from being the beneficiary (perhaps without its knowledge) of that conduct. Sprint believes that a strong commitment by the Commission to enforce its nondiscrimination rules is more likely to be effective than a rule against "steering."

The Commission proposes that a U.S. licensed foreign carrier not be able to use foreign market telephone customer information unless that information was made available on a nondiscriminatory basis to other U.S. carriers. *See* NPRM at para. 105. This is a more complicated issue than might at first appear. Customer information is generated not only by dominant carriers, but by all carriers. Controlling the flow of all foreign generated customer information between all foreign carriers and all U.S. carriers will present enormous (and largely unsolvable) enforcement problems. The Commission should at least think twice before getting involved in a morass of this sort.

The information at issue here - foreign generated customer information - is not Customer Provided Network Information (CPNI) under Section 222 of the Communications Act. The Commission is not responsible for the privacy of such information. Instead, such privacy is the concern of, and is within the jurisdiction of, the foreign administration where the information originated and to whose citizens it pertains. To the extent that the foreign administration is concerned with privacy interests of its citizens (and Sprint assumes it will have such concerns), it can take steps to require its own licensees to guarantee the secrecy of such information in the same way as the Congress and the FCC obligate U.S. carriers to protect U.S. CPNI by complying with Section 222.

To the extent that the U.S. and the Commission have an interest in foreign information, it relates solely to the possibility that the unequal distribution of such information will harm U.S. competition. Thus, the Commission may wish to intervene where the exchange of such foreign customer information is sufficiently widespread or important as to have an anticompetitive effect in a particular international route, and where such exchange may otherwise be considered unfair.[30] For example, the Commission may not wish to intervene where all U.S. carriers are receiving information from their foreign affiliates.

Sprint believes that the problem of competitive harm here can best be addressed on a case by case basis. As explained above, for the Commission to adopt a prophylactic

[30] *See, e.g.*, Comments of Sprint on the BT/MCI merger, January 24, 1997 at 8-9.